

**Quality C.A.T.V., Inc. and Charles H. Boyle, Jr.  
and Jerry Reners.** Cases 25-CA-14714(E) and  
25-CA-14714-2(E)

April 5, 1991

**SECOND SUPPLEMENTAL DECISION AND  
ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On December 15, 1988, Administrative Law Judge Stephen J. Gross issued the attached Order. The Applicant filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Applicant filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Order and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> conclusions, and Order as explained below.

Having accepted the court remand mentioned below as the law of the case, we characterize the procedural sequence of this case as follows. In 1986 the Board found that the Respondent unlawfully discharged Boyle and Reners for concertedly refusing to work to protest what they perceived to be their supervisor's lack of concern for their comfort (the discomfort theory). 278 NLRB 1282 (1986). In 1987 the Seventh Circuit disagreed, holding that the discomfort theory was not encompassed within the complaint and had not been fully litigated. Rather than putting the case to rest, however, the court remanded to the Board to decide whether the employees were unlawfully discharged because they concertedly refused to work to protest unsafe working conditions (the safety theory). 824 F.2d 542. According to the court, the administrative law judge's credited version of events was that the employees had refused to work to protest their discomfort, not to protest safety concerns.

For the following reasons, we find that the General Counsel was substantially justified in pursuing the complaint before and after the court's remand.

1. Before the court's remand. In dismissing the allegation that the Respondent violated Section 8(a)(1) by discharging Boyle and Reners for protected concerted activity, the administrative law judge concluded that their concerted refusal to climb poles when they and their clothing were wet was not motivated by safety considerations, as the General Counsel had alleged. The judge found that Boyle and Reners knew the poles

they refused to climb did not carry electric powerlines, that their concern about safety conditions applied only to poles with electric powerlines, and that they refused to climb the poles because they were irritated at their supervisor's indifference to their comfort.

Thus, for the judge, the critical flaw in the General Counsel's case was the complaint's attribution to Boyle and Reners of a motive for concerted activity that did not square with their subjective reasons for acting. As neither Boyle nor Reners admitted that their real motivation was irritation at their supervisor, the judge's conclusion regarding their motives was based on inferences from their and others' testimony.

The evidence from which the judge inferentially concluded that discomfort (not safety) motivated the employees was susceptible to a different interpretation. Specifically, the judge could have concluded from the testimony of employee witnesses that Boyle and Reners expressed concern about the safety of climbing poles while wet and decided not to climb the poles before the confrontation with their supervisor; and (given that the Respondent had warned employees about climbing poles when wet) that Boyle and Reners, faced with the prospect of climbing the poles at issue and other poles that afternoon, reasonably believed climbing poles that day would jeopardize their safety. If the judge had made these inferences, he could have found that Boyle and Reners were motivated by safety concerns as the complaint alleged and the Respondent violated Section 8(a)(1) by discharging them. Similarly, the General Counsel's argument to the Board on exceptions that the judge's interpretation of the facts and law were erroneous had a "reasonable basis both in law and in fact," and thus was also substantially justified. *Pierce v. Underwood*, 487 U.S. 552, 563 (1988).

Thus, we conclude that the General Counsel was substantially justified in pursuing the safety theory in the exceptions stage of the proceeding.

2. After the court's remand. The General Counsel's continuation of the case after the court's remand was also substantially justified. When the court remanded the case, it did not order the Board to dismiss the complaint. We believe the court chose this course because it recognized, as we summarized above, that different, but reasonable, inferences could be drawn from the record.

After the remand and after further review of the record, the Board chose not to make the above inferences. 289 NLRB 648 (1988). Possessing substantial justification, however, does not mean prevailing. Because we believe the evidence was subject to reasonable inferences that would have warranted finding a violation, because such inferences bear ultimately on the judge's credibility resolutions, and because the

<sup>1</sup> Contrary to the judge, we find that the Applicant seeks an award of fees and expenses incurred before the Board following the Seventh Circuit's remand. We find it unnecessary to pass on the judge's determination that the procedures the Applicant followed on remand preclude an award for that stage of the proceedings.

court recognized this and remanded the case,<sup>2</sup> we find that the General Counsel was substantially justified in continuing to litigate the case after the court's remand.<sup>3</sup>

### ORDER

The recommended Order of the administrative law judge is adopted and the application of the Applicant, Quality C.A.T.V., Inc., Indianapolis, Indiana, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

<sup>2</sup>Thus, we do not agree with our dissenting colleague's view that the court decision precludes a reasonable person from continuing to argue the discomfort theory. In fact, we read the court's extensive discussion of due process concerning the General Counsel's discomfort theory as expressly recognizing the possibility that, on reopening the record to permit further litigation, the Board might enter an order on remand finding a violation. Presumably, the court would not remand the case for the purpose of permitting the General Counsel to seek issuance of an Order that could only be unreasonable in law and fact. Nor do we see the General Counsel's request to reopen the record as an afterthought. On the contrary, we believe that the court may have implicitly suggested that the Board reopen the record to permit further litigation of the discomfort theory as well as the safety theory, which the Board had found unnecessary to pass on in its original decision. The General Counsel reasonably pursued both alternatives on remand.

<sup>3</sup>Member Devaney disagrees that the General Counsel was substantially justified in pursuing this litigation after the Seventh Circuit Court of Appeals remanded the case to the Board. Thus, he would award fees and expenses incurred at this stage of the litigation. In his view, the outcomes possible after remand were limited by two factors: first, the court's rejection on procedural grounds of the "discomfort theory" on which the General Counsel proceeded before the Board, and second, the Board's adoption of the judge's crediting of testimony that Boyle and Reners did not refuse to climb the poles for the reasons alleged in the complaint and advanced at the hearing. These factors limited the factual and legal strategies open to the General Counsel so severely that, even though the court's remand appeared to provide a "second bite at the apple," the General Counsel could not have had a basis for believing that he would ultimately prevail "that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The General Counsel's approach in his statement of position after remand bears out this impression: the brief advances no workable theory, given the law of the case, for finding a violation, and seeks a reopened hearing only as an afterthought. Instead, the brief is given over largely to arguments that the "discomfort theory" is inseparable from safety concerns, that the Respondent had not been denied due process, and that the Board should reaffirm a finding that the Respondent violated the Act on the basis of evidence and argument already presented to it. With regard to these arguments, Member Devaney acknowledges that miracles may happen, but as he agrees with the District of Columbia Court of Appeals that evaluating EAJA applications is a purely secular inquiry, he would award fees and expenses for this final stage of litigation. See *Leeward Auto Wreckers v. NLRB*, 841 F.2d 1143, 1148 (1988).

### ORDER

#### Introduction

STEPHEN J. GROSS, Administrative Law Judge. This case began when Charles H. Boyle, Jr. and Jerry Reners filed charges alleging that Quality C.A.T.V. (Quality) fired them because they concertedly refused to perform dangerous work. Reners additionally charged that agents of Quality assaulted and threatened him. A complaint issued, tracking the allegations of the charges. I heard the case and issued a decision and recommended Order dismissing the complaint. The General Counsel excepted, and the Board held (at 278 NLRB 1282 (1986)) that Quality had violated the National Labor Relations Act when Quality fired Boyle and Reners. On re-

view, the United States Court of Appeals for the Seventh Circuit denied the Board's petition for enforcement, granted Quality's petition for review, and remanded the case to the Board. 824 F.2d 542 (1987). On remand the Board, "accepting the court's opinion as the law of the case," dismissed the complaint. 289 NLRB 648 (1988).

Quality thereafter applied for an award of attorneys' fees and expenses totaling \$44,078.14 pursuant to the Equal Access to Justice Act (EAJA).<sup>1</sup>

The General Counsel has responded to Quality's EAJA application with a motion to dismiss. Quality has filed a brief in opposition to that motion.

This Order grants the General Counsel's motion to dismiss. In respect to the portion of the adjudication dealing with the alleged assault and threats against Reners, my conclusion is that the General Counsel's position was substantially justified. As for the portion of the proceeding dealing with the Boyle and Reners discharges: (1) it is for the Seventh Circuit, not the Board, to determine whether the Board should reimburse Quality for the fees and expenses that Quality incurred in appealing the Board's decision to the Seventh Circuit and in responding to the Board's petition for enforcement; (2) in the adjudication before the Board prior to remand, Quality was not the prevailing party;<sup>2</sup> and (3) Quality has not sought reimbursement for any fees or expenses it incurred in connection with the proceedings before the Board on remand and, in any event, the nature of the litigation on remand precludes reimbursement under EAJA.

#### The Alleged Threats and Assault Against Reners

The complaint alleged that members of Quality's management assaulted Reners and threatened him because he "was the subject of charges filed with the Board and gave testimony to the Board." Reners testimony supported that allegation. In dismissing the complaint in this respect, I concluded, essentially, that although the General Counsel had presented a prima facie case, there was nothing about the demeanor of either Reners or Quality's witnesses or about the circumstances surrounding the incident that made Reners' account more probable than that portrayed by Quality's witnesses.

That adds up to substantial justification on the part of the General Counsel. See *Leeward Auto Wreckers*, 283 NLRB 574 (1987); see generally *Pierce v. Underwood*, 487 U.S. 552 (1988).

The General Counsel filed exceptions to this part of my recommended decision, and again Quality prevailed. In fact the Board's decision did not even refer to those exceptions. But my credibility determinations were not so obviously correct that the General Counsel's decision to take exception to them should be deemed unreasonable. See *Danzansky-Goldberg Memorial Chapels*, 272 NLRB 903, 906 (1984).

<sup>1</sup>The application seeks reimbursement for \$42,317.14 of fees and expenses incurred by Quality. In addition, Quality's brief opposing the General Counsel's motion to dismiss the EAJA application refers to additional fees and expenses of \$1761.

<sup>2</sup>Quality may obtain reimbursement under EAJA only to the extent that it was the "prevailing party." 5 U.S.C. § 504(a)(1); see also Subpart. T of the Board's Rules and Regulations.

### Quality's Discharge of Boyle and Reners

*The proceedings before the Seventh Circuit:* The fact that Quality prevailed on appeal to the Seventh Circuit raises the question of whether the Board was substantially justified in adopting the position that it did in its Decision and Order and in seeking to enforce that Order in proceedings before the Seventh Circuit. (A substantial part of the fees and expenses for which Quality seeks reimbursement were incurred in those proceedings.) But it is for that court, rather than the Board, to pass on whether the Board's position was substantially justified. See 28 U.S.C. §§ 2412(d)(1)(A) and (d)(3).

*The proceedings before the Board prior to remand:* If the Seventh Circuit had dismissed the case against Quality, rather than remanded it, it would be clear that, in the adjudication before the Board, the General Counsel, not Quality, was the prevailing party. (The final Board action, in that situation, would have been a decision finding a violation of the Act.) And that, in my view, would have precluded Quality from entitlement to EAJA reimbursement in respect to the adjudication before the Board. Here, because the court remanded the case, the final Board action was an order dismissing the complaint. But the fact that the court of appeals remanded the case—which is an outcome less favorable to Quality than an outright reversal of the Board by the court would have been—should not affect the determination of who was the prevailing party in the adjudication before the Board prior to remand.<sup>3</sup>

<sup>3</sup>One can conceive of a situation in which: (1) the Board finds a violation of the Act; (2) a reviewing court remands; (3) on remand the Board decides that it had been wrong; and (4) the Board concludes, as a matter of its own judgment, that there had been no violation of the Act. In that situation the respondent could perhaps argue that the proceedings before the Board prior to remand and the proceedings on remand should be considered together for the purpose of determining whether the respondent was the prevailing party under EAJA. But on remand here the Board concluded only that "the court's decision, which is the law of the case, precludes the Board from finding a viola-

I accordingly conclude that Quality was not the prevailing party in respect to the adjudication before the Board prior to remand, regarding the discharge of Boyle and Reners.

*The proceedings before the Board on remand:* Quality did prevail in the proceedings on remand. But Quality has not asked for reimbursement of any of the fees and expenses it incurred in connection with the remanded proceeding. And even had Quality sought such reimbursement, it would not appear that any would be appropriate in view of the procedures followed on remand. (On remand the Board asked for simultaneous filings of statements of position from the General Counsel and Quality. As it turned out, Quality filed first. The Board accordingly gave Quality the opportunity to file a response to the General Counsel's statement of position. But Quality chose not to do so, and the Board issued its supplemental decision without further litigation.)

### Other Matters

The General Counsel's motion to dismiss and Quality's brief in opposition to it raise other issues, namely:

(1) Whether an EAJA application must specify whether the applicant has any affiliates.

(2) Whether a "cost-of-living adjustment" may be applied to the \$75-per-hour rate referred to in the Board's EAJA rules.

(3) What degree of specificity is required of counsel for an EAJA applicant in listing services performed.

I need not reach such issues, however, in view of my dismissal of Quality's application on the grounds stated above.

### CONCLUSION

Quality's application for award of fees and other expenses is dismissed.

tion" of the Act under the theory that the Board had adopted. (Supplemental Decision and Order.)